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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COYNESS L. ENNIX JR., M.D.,

Plaintiff,

vs.

ALTA BATES SUMMIT MEDICAL
CENTER,

Defendants.

Case No. C 07-2486 WHA

**PLAINTIFF'S MOTION IN LIMINE
NO. 7 TO MEMBERS OF ALTA
BATES MEDICAL STAFF;
DECLARATION OF RACHEL
SATER**

**Trial Date: June 2, 2008
Dept: Ctrm. 9, 19th Floor
Judge: Hon. William H. Alsup**

Plaintiff Coyness L. Ennix, Jr. ("Dr. Ennix") moves to exclude testimony of members of the Alta Bates Medical Staff. ABSMC operates two separate campuses through two separate medical staffs: the Summit Medical Staff and the Alta Bates Medical Staff. ABSMC designated several Alta Bates Medical Staff members to testify regarding surgeries Dr. Ennix performed at the Alta Bates campus. But such surgeries were not part of the challenged peer review, which included only Dr. Ennix's activities at the Summit campus. Further, none of the Alta Bates Medical Staff members that ABSMC designated took part in the peer review at issue. Therefore,

1 their testimony would not have been considered by ABSMC and would have no probative value
2 regarding ABSMC's motivation or the veracity of its proffered justification of protecting "patient
3 safety." If such testimony has any probative value, it is outweighed by the potential for
4 prejudice, confusion, and waste of time.

5 Therefore, the Court should exclude all testimony of members of the Alta Bates Medical
6 Staff.

7 STATEMENT OF FACTS

8 Dr. Ennix claims that ABSMC discriminated against him based on his race in violation of
9 42 U.S.C. § 1981 in a peer review process conducted at the Summit campus. In its initial
10 disclosures, ABSMC stated that it would call the following members of the Alta Bates Medical
11 Staff, alleging that they had knowledge regarding Dr. Ennix's surgeries at Alta Bates, the reasons
12 for the closure of the Alta Bates cardiac surgery program, the Junod Report, and other issues
13 regarding the peer review process at the Alta Bates campus: Philip L. Zemansky, M.D.,
14 Stephen Cooper, M.D., Ronald A. Dritz, M.D., John Rosenberg, M.D., Gretchen Kuntz, M.D.,
15 and Robert J. Swanson, M.D. (See Sater Decl., ¶ 2, Exhibit A, at 8:16-9:22.) None of the
16 designated individuals participated in the peer review process at issue in this case; indeed,
17 ABSMC never investigated Dr. Ennix's performance at the Alta Bates campus. (Sater Decl., ¶ 3,
18 Exhibit B.) Further, during the course of this litigation, ABSMC prevented Dr. Ennix from
19 obtaining discovery relating to peer review activities at the Alta Bates campus, arguing that it
20 was a separate entity whose activities were not relevant to this case. (Sater Decl., ¶ Exhibit C, at
21 2-3.)

22 ARGUMENT

23 The sole issue in this case is whether race was a factor in ABSMC's peer review actions
24 against Dr. Ennix that nearly ruined his career as a cardiac surgeon. This Court should exclude
25 testimony by the designated members of the Alta Bates Medical Staff because none of them
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DECLARATION OF RACHEL J. SATER

I, Rachel J. Sater, declare:

1. I am an attorney licensed to practice law in the State of California and in this Court. I am an attorney at Moscone, Emblidge & Quadra, LLP, counsel of record for the Plaintiff.

2. Attached hereto as Exhibit A is a true and correct copy of relevant portions of ABSMC's initial disclosures in this case.

3. I am informed and believe that Drs. Zemansky, Cooper, Dritz, Rosenberg, Kuntz, and Swanson did not participate in Dr. Ennix's peer review. Attached as Exhibit B are excerpts from the deposition of ABSMC's Chief of Staff Dr. Isenberg, stating that ABSMC did virtually nothing to investigate Dr. Ennix's activities at the Alta Bates campus.

4. During the course of this litigation, ABSMC prevented Dr. Ennix from obtaining discovery relating to peer review activities at the Alta Bates campus, arguing that it was a separate entity whose activities were not relevant to this case. For example, attached as Exhibit C is a copy of a letter the parties submitted to Magistrate Spero that includes Defendant's position on the separate nature of the campuses and consequent "irrelevance" of peer review activities at the Alta Bates campus.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Dated: April 29, 2008

/s/
Rachel J. Sater

EXHIBIT B

15 Q. Let me show you what we marked this morning at
16 Dr. Steven Stanten's deposition as Exhibit 1059.

17 Can you tell me if that's the transmittal
18 letter that came with the Junod report when you first
19 became aware of the Junod report?

20 A. This looks like it, yes.

21 Q. Okay. And are you -- do you recall, when you
22 received it, that it stated that at Alta Bates, they
23 made no representation about the Junod report's
24 accuracy, credibility or reliability?

25 A. Yes.

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1 Q. Now, that's a letter addressed to Annette
2 Shaieb. Is that how do you pronounce her name?

3 A. Shaieb.

4 Q. Did you receive it, the letter and the report,
5 from Dr. Shaieb, or did you receive it directly from
6 Alta Bates or some other way?

7 A. Dr. Shaieb brought it to the officers
8 committee meeting, which was held the last Tuesday of
9 every month, and shared it with the officers. And said,
10 you know, just so you are aware of this. That was it.

11 Q. Okay. After receiving the Junod report, what
12 did you do, if anything, to investigate Dr. Ennix's
13 patient care activities at the Alta Bates campus?

14 A. At any time?

15 Q. Yes.

16 A. After the minimally invasive cases arose, I

17 then pulled out the Junod report and reviewed it. I

18 then contacted both Drs. Rosenberg and Kunitz --

19 Q. Could you spell it for the record?

20 A. K-u-n-i-t-z, and R-o-s-e-n-b-e-r-g.

21 -- to see if they were willing to share more
22 information. Dr. Kunitz provided a lot of verbal
23 things, but nothing in writing. And Dr. Rosenberg
24 similarly said the concerns we had were expressed in the
25 Junod letter. We haven't gone any further to

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1 investigate them or process them because Dr. Ennix isn't
2 practicing here anymore. And so we left that to you,
3 where you could get a better handle on his practice,
4 because he's working in your campus exclusively now.

5 Q. And did you do anything after that to
6 investigate the credibility or reliability of the Junod
7 report in terms of its analysis of cardiac surgery at
8 the Alta Bates campus?

9 A. We asked -- I again asked Dr. Kunitz for any
10 written documentation. And my recollection is the only
11 document that was provided was a summary from a peer
12 review committee meeting at Ashby that I think Dr. Ennix
13 attended, where some concerns had been raised. And I
14 think this may have been the meeting that then prompted
15 the Junod report to be requested.

16 That was the only written document that we
17 ever obtained. We did not pull the primary records,
18 have them reviewed.

19 Q. Did you do anything else?

20 A. No.

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11 ALTA BATES SUMMIT MEDICAL CENTER

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14

15 COYNESS L. ENNIX, JR., M.D.,

16 Plaintiff,

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18 v.

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20 ALTA BATES SUMMIT MEDICAL CENTER,

21 Defendant.
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CASE NO. C 07-2486 WHA

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION IN LIMINE
NO. 7 TO MEMBERS OF ALTA
BATES MEDICAL STAFF**

DATE: May 19, 2008
TIME: 2:00 p.m.
DEPT: Ctrm. 9, 19th Floor
JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007
TRIAL DATE: June 2, 2008

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT.**

2 Plaintiff Coyness L. Ennix, Jr. ("Plaintiff" or "Ennix") seeks to prevent
 3 Defendant Alta Bates Summit Medical Center's ("ABSMC" or "the Hospital") from
 4 presenting testimony of physicians from the Alta Bates campus of ABSMC to testify at
 5 trial. Plaintiff contends that testimony of these proposed witnesses is irrelevant to the
 6 issue to be tried at trial, and if admitted, would be more prejudicial than probative.
 7 Plaintiff's request that the Court exclude the testimony of these physicians is based upon
 8 a faulty premise—namely, that information provided by Alta Bates campus physicians
 9 was not considered in the decision to restrict Plaintiff's surgical privileges. In fact, Alta
 10 Bates physicians provided information about issues raised by Plaintiff's surgical
 11 practices at the Alta Bates campus. (Plaintiff had performed cardiac surgery there
 12 before he transferred his cardiac practice to the Summit campus in 2003.) The Alta
 13 Bates Medical Staff also provided the MEC with a report that was generated during a
 14 review of surgeries Plaintiff performed at Alta Bates in 2002. If required, Alta Bates
 15 physicians may also provide testimony rebutting Plaintiff's assertion that the closure of
 16 the Alta Bates cardiac program was unrelated to the poor outcomes associated with
 17 surgeries he performed at Alta Bates.

18 All of this information was provided to the Medical Executive Committee
 19 ("MEC") that ultimately decided to restrict Plaintiff's surgical privileges in 2005. At the
 20 trial of this action, the trier of fact must determine whether the MEC's decision was the
 21 result of race discrimination. The full scope of information that was provided to the MEC
 22 is therefore relevant, including that received from the physicians on the Alta Bates
 23 Medical Staff. The testimony is probative of the issue of the MEC's motivations, and
 24 therefore relevant and admissible. Its probative value is not outweighed by the risk of
 25 prejudice, and the Plaintiff's motion in limine should be denied in its entirety.

26 **II. RELEVANT FACTS.**

27 Following a peer review of his surgical practices and outcomes, ABSMC
 28 suspended and then placed restrictions upon Plaintiff's surgical privileges at ABSMC. At

1 issue in the trial of this action is Plaintiff's contention that the actions taken by the
 2 Hospital were due to race discrimination, and therefore violated 42 U.S.C. Section 1981.
 3 At the trial of this action, ABSMC intends to present testimony of the following physicians
 4 who were part of the Medical Staff of the Alta Bates campus of ABSMC: Dr. Gretchen
 5 Kunitz, and Dr. Larry Zemansky. Dr. Zemansky will provide testimony concerning poor
 6 outcomes of surgeries performed by Plaintiff at the Alta Bates campus, and the reasons
 7 for the closure of the Alta Bates campus cardiac program in 2003. Dr. Kunitz will provide
 8 testimony regarding the reasons why a peer review process regarding Plaintiff was
 9 initiated in 2002, was not completed, and was relayed to the Summit Medical Staff when
 10 Dr. Ennix transferred his practice from the Alta Bates campus to the Summit campus.
 11 Dr. Ronald Dritz, also an Alta Bates Medical Staff physician with knowledge of problems
 12 with Plaintiff's prior surgical outcomes, will provide testimony at the trial of this action
 13 only if needed.¹

14 Alta Bates Summit Medical Center has two separate campuses—Summit
 15 and Alta Bates, each of which has a separate Medical Staff. (Declaration of William M.
 16 Isenberg "Isenberg Decl." ¶ 4.) Importantly, since July of 2003, Alta Bates and Summit
 17 Medical staffs have been parties to a Memorandum of Understanding, which provides for
 18 the sharing of peer review information concerning physicians in whom the staffs have a
 19 common peer review interest. (Isenberg Decl. ¶ 4.) Pursuant to this contractual
 20 agreement, information was provided to and considered by the Summit peer reviewers.
 21 Included in this information was the report of an outside reviewer, Dr. Forest Junod,
 22 regarding cardiac surgeries that Plaintiff had performed at the Alta Bates campus.
 23 (Isenberg Decl. ¶ 7.) Indeed, the Junod report was among the factors that prompted the
 24 peer review in the first instance. (*Id.* at 5.)

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 27 ¹ The remaining physicians identified in Plaintiff's motion in limine: Dr. Stephen Cooper,
 28 Dr. John Rosenberg, and Dr. Robert Swanson, have not been designated to testify in
 this action on behalf of the Hospital. Plaintiff's motion in limine with respect to those
 individuals is therefore moot.

1 This was not the only information considered as part of the peer review of
 2 Plaintiff that originated with Alta Bates physicians. Problems with surgeries conducted
 3 by Plaintiff at the Alta Bates campus had been identified in 2002 however, the process of
 4 reviewing those surgeries was not completed due to the early 2003 closure of the Alta
 5 Bates cardiac surgery program. Alta Bates physicians provided information regarding
 6 the reasons the earlier peer review process was not completed, the reason for the
 7 closure of the Alta Bates cardiac program, and the basis of the earlier concerns about
 8 Plaintiff's surgical practices.

9 **III. ARGUMENT.**

10 **A. The Testimony Of Alta Bates Physicians Is Directly Relevant To The**
 11 **Key Issue To Be Decided At The Trial Of This Action.**

12 Pursuant to Evidence Code section 401, relevant evidence—"evidence
 13 having any tendency to make the existence of any fact that is of consequence to the
 14 determination of the action more probable or less probable than it would be without the
 15 evidence"—is admissible at trial. Evid. Code s 401. The central fact to be determined in
 16 this action is whether the restriction of Plaintiff's surgical privileges following the peer
 17 review, was based on racial discrimination. Key to that question is the nature and
 18 substance of the information that was received and considered by peer review
 19 participants.

20 Plaintiff's motion in limine is based on the faulty premise that Alta Bates
 21 physicians did not contribute to the information that was gathered in the course of the
 22 2004/2005 peer review of Plaintiff. The decision of the MEC was based on information
 23 received from a number of sources, including members of the Alta Bates Medical Staff.
 24 The information provided by the Alta Bates physicians, and their testimony regarding
 25 those contributions, is relevant to the jury determination of whether racial discrimination
 26 motivated ABSMC's decision to take corrective action against Plaintiff.

27 The Alta Bates physicians had an obligation under the Memorandum of
 28 Understanding to provide confidential peer review information to their counterparts at the

1 Summit campus. They did so by providing the Summit peer reviewers with the outside
2 report documenting the problems with cardiac surgeries Plaintiff performed at Summit in
3 2002. In addition to sharing the Junod report with the peer reviewers, the Summit
4 Medical Staff also provided information about the concerns that prompted the Junod
5 report in the first place. Their testimony regarding these issues will permit the jury to
6 assess whether ABSMC's articulated reason for restricting Plaintiff's surgical privileges is
7 credible, and whether it was motivated by discrimination.

8 The testimony of the Alta Bates physicians is relevant to another factual
9 issue presented by this case. Plaintiff has repeatedly indicated in this action that the
10 cardiac program at the Alta Bates campus was discontinued due to his own push to
11 have the cardiac practices of the two campuses consolidated. In truth, the earlier
12 problems—which mirrored those that arose when Plaintiff moved his cardiac practice to
13 the Summit campus—were key to the decision to shut down the Alta Bates program.
14 Plaintiff's explanation, though patently untrue, is apparently intended to obfuscate the
15 fact that problems with his surgical practices were raised as early as 2002, when he was
16 performing cardiac surgeries at the Alta Bates campus. Plaintiff asserted that he "closed
17 down" the Alta Bates cardiac surgery practice in the course of the investigation of his
18 surgical practices. Information about the true reasons for the closure of the Alta Bates
19 cardiac program was communicated to the peer reviewers and was in the possession of
20 the MEC as it made the decision to restrict Plaintiff's privileges. The Alta Bates
21 witnesses will testify to their knowledge of the reasons for the closure of the Alta Bates
22 cardiac program, as well of their concerns about Plaintiff's prior surgical practices.

23 Plaintiff seeks to remove from the jury's consideration information that was
24 provided to the MEC and that informed the challenged decision in this case. The
25 information relevant to the jury's determination of whether ABSMC was motivated by
26 racial discrimination goes beyond the narrow scope urged by Plaintiff. It includes all
27 information available to the decision makers regarding Plaintiff, his past surgical
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1 practices, and reputation. Such information is relevant to the jury's evaluation of
2 ABSMC's intent.

3 **B. The Testimony To Be Offered By Alta Bates Campus Physicians Is**
4 **Not More Prejudicial Than Probative.**

5 Plaintiff asserts that the testimony of the Alta Bates physicians should be
6 excluded because its probative value is substantially outweighed by the potential
7 prejudicial impact on the jury. This assertion is unsupported by the facts and should be
8 rejected by this Court. Rule 403 provides:

9 Although relevant, evidence may be excluded if its probative
10 value is substantially outweighed by the danger of unfair
11 prejudice, confusion of the issues, or misleading the jury, or
12 by considerations of undue delay, waste of time, or needless
13 presentation of cumulative evidence.

14 F.R.E. 403. District courts are accorded great latitude in determining whether the
15 prejudicial effect of evidence outweighs its probative value. *Trevino v. Gates* (9th Cir.
16 1996) 99 F.3d 911, 922.

17 Plaintiff's sole argument in support the contention that the probative value
18 of the testimony of the Alta Bates doctors is substantially outweighed by prejudice, is that
19 the jury might conclude that the testimony provided by the physicians was considered in
20 the course of the peer review of Plaintiff. Plaintiff's expressed concern is without merit.
21 As discussed, the Alta Bates physicians did provide information that was considered by
22 ABSMC in the peer review process. The testimony of the physicians will assist the jury
23 in its evaluation of whether the Hospital acted based on racial animus, or whether it
24 relied on facts that supported its decision to take corrective action against Plaintiff. The
25 testimony of the Alta Bates physicians should be admitted.

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1 **IV. CONCLUSION.**

2 For each of the foregoing reasons, Defendant ABSMC respectfully
3 requests that the Court deny Plaintiff's Motion in Limine No. 7 to prevent members of
4 Defendant's Alta Bates campus Medical Staff from testifying at the trial of this action.

5 DATED: May 9, 2008

KAUFF MCCLAIN & MCGUIRE LLP

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7 By: 

ALEX HERNAEZ

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9 Attorneys for Defendant
10 ALTA BATES SUMMIT MEDICAL
11 CENTER
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